UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

iRACING.COM MOTORSPORT SIMULATIONS LLC, )
a Delaware Limited Liability Company, Plaintiff )
                                               )
V.                                             )        Civil Action No.
                                               )        05-11639 NG
TIM ROBINSON, individually and d/b/a           )
www.ow-racing.com and www.torn8oalley.com,     )
Defendant                                      )

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## DIRECT TESTIMONY OF TIM MCARTHUR

My name is Tim McArthur. I reside in Longmont, Colorado. I am a sim racing

enthusiast. Presently I host a site that conducts simulated races, at www.race2play.com.

1. I formerly worked for Papyrus Design Group, until 1999. Papyrus Design Group was a

part of Sierra, which was a subsidiary of Vivendi. While I was employed at Papyrus, Papyrus

developed and released several NASCAR racing games. My work on those games consisted of

design, production and testing. Papyrus continued to release new racing games after I left them.

2. After leaving Papyrus, I continued to develop add-ons for Papyrus racing games. After

Sierra released NASCAR2003 in February 2003, I worked on developing add-ons for that game

as well. I was in contact with some people at Papyrus. They were aware of my work and

encouraged me to continue to develop add-ons.

3. In 2003, Sierra announced that it would no longer be marketing NASCAR games.

Sierra's multi-year license to use the NASCAR name and logo was scheduled to expire at the

end of March 2004. When the license did expire in March 2004, Sierra was required to stop

selling the NASCAR2003 game.

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4. The NASCAR2003 game was very popular with the sim racing community, and many sim racing enthusiasts were interested in continuing to use and further develop the NASCAR2003 game. Some time between March and July 2003 a small number of enthusiasts formed a group called "Project Wildfire" for the express purpose of continuing to enhance the NASCAR2003. The group included some former employees of Papyrus. In early June 2005 Jay Taylor of Project Wildfire contacted Jan Kohl, who hosted a sim racing site, and shared their early plans with him. Kohl, in turn, spread the word to members of his site in an email dated June 5, 2003, **Exhibit 1.**

5. In August 2003 Project Wildfire went public with a new web site. Project Wildfire quickly started to post files that could be downloaded. **Exhibit 2** is a copy from the Wayback.com site showing what Project Wildfire had posted on its site by late June 2004. Project Wildfire's web posted as its "Mission Statement" the following:

> Papyrus racing simulations have provided the ultimate sim racing experience both off and online over the past 10 years. **Papyrus will no longer be producing racing simulations using the NASCAR Racing platform. However, they provided the sim racing community the ability to modify the simulation having added 3 new physics engines, a track making tool, and initialization files that can be modified in countless ways.** Project Wildfire is dedicated to exploiting those capabilities in an effort to provide a very close and passionate sim racing community further and continued enjoyment of the NASCAR Racing Series platform. PWF has a compliment of talented personnel in almost all areas required to further enhance both the on and offline racing experience. We're extremely motivated and dedicated to this effort and see no limits or end in sight in regard to the future of simulation racing using the Papyrus NASCAR Racing platform. While PWF and simulation racing will evolve, the best may well be yet to come.

6. Project Wildfire had no formal association with Sierra or Papyrus, but Papyrus encouraged Project Wildfire's work, and provided tools and new physics to Project Wildfire, knowing that Project Wildfire was sharing them with the sim racing community. My understanding, which was shared by those I raced with in the sim community, was that Papyrus/Sierra had no objection to the sim community continuing to develop and enhance the NASCAR2003 game.

7. One of the tools that Papyrus provided to Project Wildfire, that Project Wildfire posted on its web site, was a Track Editor tool named "Sandbox." Project Wildfire posted this Track Editor tool on its web site at the end of August 2003. This tool enabled the user to modify the track that came with the NASCAR2003 game and it also enabled the user to create/replicate other racing tacks around the country. Project Wildfire also reached out to the sim racing community, including the people at USPits, requesting their help in modifying the NASCAR 2003 .exe file.

8. In September 2003, Project Wildfire released on its web site a Craftsman Truck Series ("CTS") mod. **Exhibit 2.** It was my understanding that Papyrus had developed this series and had released it to Project Wildfire to share with the sim community. In December 2003 Project Wildfire released an IROC mod. **Exhibit 2.** In February 2004, Project Wildfire release the Papyrus TA (Trans Am) mod. **Exhibit 2.** Project Wildfire also released many other ad-ons to the NASCAR2003 game on its web site during the period August 2003 through May 2004. These included brand new tracks and brand new cars, as well as enhancements to the original cars and tracks. **Exhibit 2.** Some of the enhancements and add-ons were done by others but given to Project Wildfire to post on their site.

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9. In connection with Project Wildfire's release, and making available for general use, of the new mods, new tracks, new cars, and patches and tools, there were no claims of copyright, and the user was not required to enter into any agreement as to their use.

10. By Project Wildfire releasing files containing the physics and specifications for new mods, a person now had the capacity to determine which lines of code affected which attribute of a car. This is done simply by using a hex editor. Using a hex editor does not disclose the "source code"; it simply lets you read a line of code in computer language. By using a hex editor on two different physics files, one can note which lines of code are different.   Once these lines are identified, the next step is to determine which factor they affect.   The values in those lines may give a clue as to which factor they affect.   Once these factors are known, one could create a new class of mods, by substituting the values applicable to the new car. For example, using a hex editor on two files, one would observe that certain lines of code relate to the weight of the vehicle. To create a mod for a different series, one would substitute the weight of the new vehicle into those lines of code.

11. Because Project Wildfire, with Papyrus's assist, released three new mods and their physics files, one need not even look at the original NASCAR2003 file to create a new mod. One could simply compare two of the physics files of the new mods.

12. I was one of many people who worked on creating new mods and new add-ons to the NASCAR2003 game. My work in this area actually started right after leaving Papyrus in 1999, on Papyrus's NASCAR racing games that preceded the release of NASCAR2003 in February 2003. I shared my work on my web site, and Papyrus was aware of my work. Other groups, such as U.S. Pits also worked on creating add-ons to the NASCAR Racing games. Papyrus was

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aware of such work and encouraged people to do so.

13. By encouraging people to create add-ons, and sharing tools via Project Wildfire to enable people to create add-ons, Papyrus/Sierra were knowingly encouraging violations of their EULA. No instructions came with the NASCAR 2003 game on how to build a new track, or change the color of the pace car, add new tire textures, change the default online paint jobs, modify the body style, and so on.   In order to create any mod, track, cockpit, 3do, texture, or even configuration files, one must first "reverse engineer" the product to understand how to do it.

14. By early 2004 it was common knowledge that Papyrus soon would be gone and that Sierra could no longer produce any NASCAR racing game. It was my understanding, shared by others in the sim racing community with whom I was in contact, that the NASCAR2003 code soon would be dead code. Papyrus/Sierra never gave the sim racing community any reason to believe otherwise.

15. After almost a year of Project Wildfire freely sharing its work, and hosting work done by others, at the end of June or early July 2004 all of a sudden Project Wildfire removed everything from its site and replaced it with the following message that the Wayback web site captured on July 3, 2004 (**Exhibit 3**):

> Project Wildfire, the internet based creator of many popular NR2003 modifications, is pleased to announce that we have been signed on to help in the creation of a retail racing product.  We will begin to work on an exciting new racing experience immediately.  We are very proud of what we have achieved and are equally thrilled that a development studio has recognized our talents.  We look forward to discussing our future plans with you, and when the time is right we will provide you with additional details..
>
> Our site will remain active and our forums will remain up.  However, we will be

removing all downloadable content from our site

Thanks for making this a very enjoyable experience for us all. The tradition will continue...

-The Project Wildfire Staff.


16. I learned that the new product that Project Wildfire had been hired to develop was for First-Racing (now iRacing.com). John Henry, a principal owner of iRacing, is a long time sim racing enthusiast. From Project Wildfire's beginning in 2003, John Henry was closely connected with Project Wildfire. In an early interview of a Project Wildfire spokesperson that was posted on the BHMotorsports.com web site in July 2003, John Henry was identified as being the "Sr. Advisor" for Project Wildfire. He was aware that Project Wildfire personnel were reverse engineering and creating new modifications to the NASCAR2003 game and that Project Wildfire was releasing these to the public on its web site. If Papyrus/Sierra had not sanctioned and approved the release of its tools and the mods and other add-ons created by Project Wildfire, then substantially all of Project Wildfire's work would have been violations of Papyrus/Sierra's EULA.    17. David Kaemmer was a designer for the Papyrus Design Group, and one of the founders of Papyrus. Kaemmer left Papyrus about the time that Papyrus/Sierra released the NASCAR 2003 game for sale. During the ten years or so that Kaemmer was with Papyrus/Sierra, Papyrus/Sierra produced and released several different versions of NASCAR racing games. During all that time, Kaemmer never raised any objections to anyone in the sim racing community about any modifications that they made to the NASCAR game software. In the year 2000, I personally released to the sim racing community over 3 dozen mods and add-ons to the then-current NASCAR racing games. Other groups of sim racing enthusiasts also released

mods and other add-ons.  I was in contact with people at Papyrus, and Kaemmer and Papyrus/Sierra were fully aware of my work and the work of other sim racing enthusiasts.  No one raised any objection to me and other people developing and releasing our work to the sim racing community.

18. When NASCAR 2003 was released in 2003, I started working on mods and other add-ons for that game, as did other sim racing community groups.  One of those other groups that was producing mods and other add-ons was USPits.com.  Again, Papyrus/Sierra raised no objection to this ongoing work.  In July 2003, when Project Wildfire set up its web site, Papyrus began to actively lend support to enable sim racing groups to create new mods and other add-ons.  By doing so, Papyrus/Sierra necessarily was waiving any restrictions against development contained in the EULA that accompanied the original NASCAR 2003 game.

19. In 2005 when David Kaemmer first demanded that we in the sim racing community stop creating mods, Papyrus/Sierra and Project Wildfire collectively had voluntarily released tools and files that made it easier for people to create mods on their own.  Based on Papyrus's voluntary release of files and tools into the public domain without restriction on their use, and Sierra's loss of the NASCAR license and consequent inability to continue to market NASCAR2003, the sim racing community reasonably assumed that Papyrus/Sierra released any rights under their EULA regarding "reverse engineering" and creation of new mods, new tracks and other add-ons.

20. In 2005 when Kaemmer was identified with First-Racing (later iRacing), he publicly stated that his new title will not be based on NASCAR 2003.  iRacing's present web site refers to NASCAR2003 as just "a starting point" **Exhibit 4.**  In various postings dating from March

2005 to the present, iRacing has distanced itself from the NASCAR2003 game and represented that it is not a "game" company; its product is designed for professional racers as a driver development tool, **Exhibit 5.**   In magazine and  internet articles Dave Kaemmer and John Henry said that they only used very select parts of the NASCAR2003 code, specifically the multiplayer code.  Their own estimates range from 1% to 15% of the NASCAR 2003 code was used in their product.  **Exhibit 6.**

21.  In March 2005 First-Racing began posting disparaging comments by Kaemmer and others about sim racing developers like myself.  John Henry posted on a public forum inviting anyone who wished to discuss the modding of NASCAR 2003 to call him personally.  I did so.

22.  In my call with John Henry and Dave Kaemmer on March 7, 2005, they informed me that iRacing's beta testing was underway and that it was using the NASCAR2003 file as a base.  It was not told to me in confidence.  I had publicly been telling other people that information well before Tim Robinson's March 19, 2005 post on First-Racing-Sucks.com web site.

23.  Immediately after my phone call, I received a letter from iRacing lawyers demanding $5,000 for legal expenses, and that I discontinue "hacking", or they would sue me.  iRacing subsequently did serve me with a Complaint, but the case was settled and closed in May 2005 before I had to file any response.

24. In August 2005, about the time iRacing sued Robinson, John Henry started referring to Tim Robinson and myself as "dumb and dumber", and to himself as the "Minister of Change" on the First-Racing.net beta testing forums.

25. I am familiar with the OWSC mod and the NO-CD patch to it that Tim Robinson posted on his web site.  The original EULA authorized a user to make an "adaptation" of the program

for purposes of utilizing the program.   In the sim racing community a NO-CD patch is important

adaptation, because it is easy to damage or misplace a CD, particularly one that is used very

often.  If one were to damage or lose the CD, or their CD drive, that person still is entitled to use

the game on his or her PC without having to purchase another copy of the game.  The only way

to do that is either to acquire a new CD somewhere, or use a NO-CD patch.  Where, as here,

Papyrus/Sierra no longer were selling the game, the owner is entitled to use a NO-CD patch.

NO-CD patches are generally available for every computer game.  They are of no use to anyone

who does not have a legitimate copy of the NASCAR2003 game installed.  NO-CD flies are

prominently publicly posted on legitimate web sites.  The NO_CD.exe for the original

NASCAR2003 game had been publicly posted on my web site and many ohers since 2003,

without any contest or complaint from Papyrus, Siera, Vivendi or First-Racing.

BHMotorsports.com and USPits.com are just two of the other sites that hosted NO-CD files, as

well as Mod files and other files,  for the NASCAR2003 game. iRacing is the first instance I

have known where anyone has made an issue about the availability of NO-CD files.

 24.  Modifications and alterations to the NASCAR2003 NR2003.exe had been publicly

announced and common knowledge all during 2004.  My files themselves were publicly released

in June 2004, posted on my site and available via links from other sites, and went uncontested by

First-Racing and iRacing for nine months.  **Exhibit 7** is a listing of the downloads of mods,

tracks, and other add-ons that still are available on the BHmotorsports.com web site for

NASCAR2003 .


        The foregoing testimony is made and given under the pains and penalties of perjury this


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_____30<sup>th</sup>_____ day of January 2009.


Tim McArthur